

ORDER

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S.B. CIVIL WRIT PETITION NO. 1968/2006.

Date of Order :::: 24th September 2007.

P R E S E N T

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. J.K. Bhaiya, for the petitioner.
Mr. M.S. Purohit, for the respondents.

BY THE COURT:

The defendant-tenant has preferred this writ petition being aggrieved of the orders dated 27.02.2006 and 28.02.2006 passed by the District Judge, Bikaner in Civil Appeal (Order) No.52/2004 after the matter was remitted by this Court by the order dated 17.01.2006 passed in S.B. Civil Writ Petition No.4445/2004 (Om Prakash & Ors. Vs. The District Judge, Bikaner & Anr.).

By the impugned order dated 28.02.2006 (Annex.5), the learned District Judge has dismissed the appeal filed by the

defendant-petitioner and has affirmed the order dated 09.02.2004 (Annex.1) passed by the learned trial Court striking out defence against eviction because of delay in deposit of the amount of rent; and, before that, by the order dated 27.02.2006 (Annex.4) the learned District Judge rejected the prayer made by the petitioner seeking enquiry into the facts asserted by him about payment of rent of the months in dispute directly to the plaintiff.

Brief facts relevant for determination of the questions involved in this writ petition are that the plaintiff-respondents have filed a suit against the defendant-petitioner for recovery of arrears of rent and for eviction, inter alia, on the ground of default. In accordance with the requirements of Section 13(3) of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 ('the Act' hereinafter), provisional determination of rent was made on 17.05.1995 and the defendant was required to make payment of the determined amount and so also future monthly rent. According to the plaintiffs, the defendant -tenant deposited the rent for some time but after June 1998 committed several defaults in depositing the rent including that of the months of July 1998, January 1999, January 2003, and February 2003.

The plaintiffs moved an application on 05.04.2003 under Section 13(5) of the Act stating that monthly rent for several

months was not deposited in time and the defendant-tenant having committed default, his defence against eviction was liable to be struck out. The defendant submitted by way of an application that the rent for the month of July 1998 was deposited in the bank account on 20.08.1998 and that for the month of January 1999 was deposited on 16.02.1999; and the rent for the months of January and February 2003 was received by the plaintiff Om Prakash on the assurance of settlement out of court and he assured to make deposit in the bank account; and when the same was not deposited by him, the defendant-tenant had again deposited the rent in the month of March 2003. It was submitted that there was a delay of five days and two days respectively for the rent of the months of July 1998 and January 1999 and this mistake occurred for the plaintiff regularly entering into negotiations and the defendant being engaged in service work; that such delay was condonable under Sec.13(4) of the Act; and that the rent for the months of January and February 2003 has been received in cash by the plaintiff Om Prakash.

The learned trial Court proceeded to consider the matter by its order dated 09.02.2004 and observed that it was an admitted case of the defendant-tenant that he has committed defaults in deposit of rent; and found with reference to the bank-statement that rent for the month of July 1998 was

deposited with five days' delay and that for the month of January 1999 with one day's delay; and the reasons assigned by the defendant were not convincing. The learned trial Court further found that the rent for the months of January 2003 and February 2003 was deposited on 31.03.2003 and, therefore, there was a delay of about 1½ months in relation to the rent for the month of January 2003; and of 15 days in relation to the rent for the month of February 2003. The reason for these defaults as stated by the defendant was not accepted because he was regularly depositing the rent in the plaintiff's bank account No.8299, and it was not acceptable that the plaintiff would receive the amount of the rent in the name of some settlement. The learned trial Court observed that if any such amount was at all paid, the defendant would have definitely obtained a receipt thereof and it was not expected that he would provide some lacuna to the plaintiff that could be taken benefit of. The application submitted by the defendant was not accepted and on the other hand, the application filed by the plaintiffs under Sec.13 (5) of the Act was allowed and defence against eviction was ordered to be struck out.

The defendant took an appeal against the order dated 09.02.2004 and the learned District Judge proceeded to allow the appeal by the order dated 16.09.2004 (Annex.2). The learned appellate Judge firstly considered the defaults for the

months of July 1998 and January 1999 of five days and one day respectively; and with reference to the decisions of this Court, observed that condonation of delay should be liberally allowed and proceeded to condone such delay in deposit. Thereafter, the learned appellate Judge observed that the rent deposited on 31.03.2003 in relation to the months of January 2003 and February 2003 suffered from delay beyond 15 days but then, the learned Judge proceeded to consider as to whether defence against eviction should have been struck out for this delay or not? Learned Judge referred to several decisions cited by both the parties including that of the Hon'ble Supreme Court in the case of Nasiruddin Vs. Sitaram : 2003 (1) WLN (SC) 707 cited by the plaintiff but abruptly recorded the conclusion that having gone through all the decisions and facts of the case, he was of opinion that it was not necessary to strike out the defence of the defendant; that litigation was pending since the year 1994 and the defendant was regularly depositing the rent and only for the months of January and February 2003 the rent was deposited on 31.03.2003 but it was a bona fide default and not committed intentionally or with any oblique motive; and, with reference to the decision of this court in Jagannath Vs. Heerachand : 2001 DNJ (Raj.) 431, held that defence against eviction ought not to have been struck out.

The aforesaid order dated 16.09.2004 was assailed by the plaintiffs in S.B. Civil Writ Petition No.4445/2004; and after examining the considerations adopted by the learned District Judge and pointing out the law applicable to the case, particularly with reference to Nasiruddin's case (supra), this Court disapproved the observations made by the learned District Judge being contrary to the requirements of the statute while observing,-

“The learned appellate Judge has rightly found in para 8 of the impugned judgment that there was a clear-cut default in compliance of Section 13(4) of the Act and the delay being beyond the statutory period, could not be condoned. However, thereafter, the learned appellate Judge has proceeded to observe that this default was not intentional but was a bona fide default and, therefore, defence against eviction could not have been struck out. These observations remain squarely contrary to Sec.13 (5) of the Act. When a finding was definitely returned that there was non-compliance of Section 13(4) of the Act, sub-section (5) of Section 13 directly came into operation providing that if a tenant fails to deposit or pay any amount referred to in sub-section (4) on the date or within the time specified therein, the court shall order the defence against eviction to be struck out and shall proceed with the hearing of the suit.”

This Court further observed,-

“Having examined the order dated 16.09.2004 passed by the learned appellate Judge, this Court finds that the said order remains self contradictory; squarely contrary to the decision of the Hon'ble Supreme Court; and contrary to the statutory mandate. Such order cannot be countenanced or approved. It was required of the learned District Judge to have

carefully examined the scheme of the statute and so also the ratio of the decision of the Hon'ble Supreme Court and it was wholly unjustified to have relied on a decision of this Court rendered prior to Nasiruddin's case, ratio wherein stands upturned by the Hon'ble Supreme Court.

Having regard to the fact that it was a petition under Article 227 of the Constitution of India, this Court considered it appropriate to remit the matter to the learned District Judge for him to pass appropriate order after looking into the record of the case and the law applicable. This Court, thus, observed,-

“The present one being a writ petition under Article 227 of the Constitution of India, this Court considers it appropriate that while setting aside the impugned order, instead of substituting any other order, the matter be remitted to the learned District Judge with a request to look into the record of the case, requirements of the statute and so also the ratio of the decision of the Hon'ble Supreme Court and then to pass appropriate order in the light of the observations made hereinabove.”

The learned District Judge has thereafter considered the record of the case and the law applicable; and by the impugned order dated 28.02.2006 (Annex.5) has proceeded to dismiss the appeal filed by the present petitioner with the finding that for the admitted inexcusable delay, defence against eviction had rightly been struck out by the learned trial Court. Prior to it, by the order dated 27.02.2006 (Annex.4), the learned District Judge rejected a prayer made on behalf of the

petitioner for entering into an inquiry by way of cross-examination of the parties on the affidavits particularly in relation to the payment of rent for the months of January and February 2003 with the observations that the matter was required to be heard and decided as per the directions of the High Court and there was no occasion for recording any evidence.

Assailing the orders dated 27.02.2006 and 28.02.2006, learned counsel for the petitioner contended that the question of fact regarding payment of rent for the months of January and February 2003 ought to have been decided after permitting cross-examination on affidavits particularly when there was a dispute of fact for payment of rent for the said months. Learned counsel further submitted that the delay in payment of rent for the month of July 1998 was only of 5 days and that for the month of January 1999 was only of 1 day and the same could not have been made the basis of striking out defence against eviction. Learned counsel also suggested that the powers of condonation of delay could not be said to have been taken away from the ratio of Nasiruddin's case; and in the fact situation of the present case, the learned appellate court ought to have considered the case of the petitioner in relation to the rent for the months of January and February 2003, that such rent was paid to the plaintiff at his asking.

Learned counsel also submitted that in any case there was no reason to strike out defence against eviction and referred to the decision of the Hon'ble Single Judge of this Court in the case of LR's of Ramdev Kajaria Vs. Vijay Naryan : 2005(4) RLW 2288. On the other hand, learned counsel for the respondents duly supported the orders impugned with reference to Nasiruddin's case (supra).

Having examined the matter in its totality, this Court is clearly of opinion that this writ petition remains bereft of merits and deserves to be dismissed.

So far the submission regarding the order dated 27.02.2006 is concerned, suffice is to notice that the matter was under consideration before the appellate court after having been remitted by this Court; and the learned District Judge has rightly observed that the matter was required to be decided as per the direction of this Court as made in the order dated 17.01.2006; and no such proposition of entering into any enquiry by recording evidence was available. Even otherwise, mere oral assertion of the petitioner-defendant of making payment of the amount of rent directly to the plaintiff remains hollow and baseless particularly when he had been depositing the rent in the bank account of the plaintiff. The facts as asserted by the petitioner in his affidavit carry no probative value; and, as rightly observed by the learned trial Court, when

he was otherwise depositing the rent in the bank account of the plaintiff, it was not believable that he would make any payment without receipt and provide the plaintiff with a ground to be taken advantage of. The application moved by the petitioner being totally bereft of substance, has rightly been rejected by the learned District Judge by the order dated 27.02.2006.

So far the merits of the order striking out defence against eviction are concerned, admittedly the rent for the months of January and February 2003 has been deposited in the bank account of the plaintiff on 31.03.2003; and the learned subordinate courts have rightly found this delay to be beyond the extendable period of 15 days and hence, inexcusable. This Court has already pointed out while deciding Writ Petition No.4445/2004 that the proposition of considering the intention, and examining if the default was willful or not, were not of relevant considerations; and while disapproving the observations made by the learned appellate court on the proposition of "bona fide delay", this Court held,-

"The observations aforesaid remain squarely contrary to the requirements of Section 13(4) and Sec.13(5) of the Act and so also the decision of the Hon'ble Supreme Court in Nasiruddin's case (supra). In a suit for eviction based on the ground of default, provisional determination under Section 13(3) of the Act having been made, the defendant-tenant remains under obligation to make payment of the arrears and interest as determined by the order under

Section 13(3) of the Act and further to continue to pay or deposit monthly rent, month by month. Once the amount has been determined under Section 13(3) of the Act, all the requirements of Section 13(4) automatically follow; and for the tenant having failed in compliance of Section 13 (4) of the Act, the provisions of Sec.13(5) come into operation.

The decision in the case of LR's of Ramdev Kajaria (supra) is of no assistance to the petitioner. In the said case, the learned Single Judge was considering the question of waiver as suggested in the second appeal preferred by the tenant. Significantly, the learned Single Judge in the first place did not accept the contention regarding waiver on the landlord withdrawing the amount from his bank account with the observations,-

“ Waiver, is an voluntary relinquishment of a right known to exist. In that view of the matter, in my humble opinion, in absence of anything to show that at the time when the plaintiff effected withdrawal of certain amounts from the bank account, he was aware of the facts that amount he is withdrawing includes amount of rent not deposited within time, it cannot be said that it attracts any waiver.”

Thereafter, the learned Judge proceeded to consider the other facet of the matter that even if such withdrawal attracts waiver, what would be the extent, implication, and consequence of such waiver; and observed,-

“6.....May be that the additional consequences flowing from not making deposit of payment as required by Sub-section (4) as provided in Sub-section (5) i.e. striking out of the defence did not flow, and in view of the assumed waiver against the land lord, may be that this additional consequence cannot flow, but then that by itself does not entitle the tenant to the benefit of Section 13(6) of the Act, notwithstanding his having failed to make the deposit, or make the payment as required by Sub-section (4). Waiver, if at all attracted, is attracted only against the plaintiff's right to have the defence struck off. Consequently, he loses his right to have the defence struck out, but then it does not have the effect of attracting the fiction in favour of the tenant about his having made deposit, or payment as required by Sub-section (4).”

The learned Single Judge has referred to the decision in the case of Jagan Nath Vs. Heera Chand : 2001 (1) DNJ (Raj.) 431 rendered prior to the Nasiruddin's case and observed thus:

“7. Of course, after my rendering the judgment in Jagan Nath's case, judgment of Hon'ble Supreme Court in Nasiruddin's case came, with the result that discussions made by me in Jagan Nath's case on the anvil of Section 5 of the Limitation Act became irrelevant, but then I maintain the reasonings given by me about the consequences of non-striking out of the defence, even in cases where the defendant has not made deposit, of payment of the rent as required by Section 13(4) of the Act to the effect that to that extent the tenant will not be entitled to the benefit under Section 13(6) of the Act.”

The said decision is absolutely of no help to the petitioner.

In the present case, with the default for the month of January and February 2003 being beyond the excusable limits, the ratio of Nasiruddin's case hits the petitioner fair and square wherein the Hon'ble Supreme Court has concluded in no uncertain terms,-

“41. In that view of the matter it must be held that in absence of such provisions in the present Act the Court did not have the power to either extend the period to deposit the rent or to condone the default in depositing the rent.”

This Court in the case of Heera Lal Vs. Mandir Shri Thakurji Sangria & Anr.: 2005(2) WLC(Raj.) 799 after considering the scheme of provisions of Section 13(3) to 13(6) of the Act and the effect of the decision of the Hon'ble Supreme Court in Nasiruddin's case has held,-

“In nutshell, it could be concluded that the stream of a line of view that Section 5 of the Limitation Act could be applied and delay could be condoned in default of the compliance of Section 13(4) of the Act beyond the statutory period fixed by the said provision itself which was built on the basis of B.P. Khemka (P) Ltd.'s case and Gopal Dass's case (Supra), has travelled a full circle culminating into the authoritative pronouncement by the Hon'ble Apex Court in Nasiruddin's case (Supra). The controversy having met with its quietus in Nasiruddin's case (Supra), this Court is clearly of opinion that the principles as seen from the Division Bench decision of Firm Kripa Ram Ganeshilal's case (Supra) now hold the field, the ratio of all decisions to the contrary having been overruled in toto by Nasiruddin's case. Therefore, it is evident that Court has no power to extend the period for deposit of the rent under Section 13 of the Act nor to condone the default in depositing

the rent as there are no provisions in the Act granting such powers to the Court.”

The appellate court has not committed any error in rejecting the appeal filed by the petitioner; and there is no scope for interference in this writ petition.

The writ petition fails and is, therefore, dismissed. In the circumstances of the case, the parties are left to bear their own costs.

(DINESH MAHESHWARI), J.

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